

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

KETCHIKAN PULP COMPANY

Petitioner,

VS.

REID BROTHERS LOGGING COMPANY,

Respondent.

**REPLY BRIEF OF PETITIONER,
KETCHIKAN PULP COMPANY**

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A. Preliminary Statement

Respondent's brief in opposition to KPC's petition scarcely addresses the issues presented in that petition, which include: (1) whether a purely subjective, non cost-based standard can be used to determine the line between predatory and competitive prices or bids; (2) whether antitrust injury can be caused by a better-than-competitive price, with damages wholly unrelated to alleged antitrust misconduct; and (3) whether liability and damages can be based on evidence well outside the statute of limitations period. Consistent with respondent's approach in the courts below, respondent instead urges this Court that the allegation of an all-encompassing, amorphous conspiracy erases the need for legal standards or analysis.

KPC will focus on the few points raised by RBLC which relate to the questions presented in KPC's petition. As shown below, contrary to RBLC's contention, the lower courts do not and should not distinguish between single-firm and conspiracy cases in determining what standard

to apply to claims of predatory bidding. Accordingly, this Court is faced with the same issue of the applicable standard in this case as that presented in other petitions in this term in cases involving single-firm predatory pricing; in fact, the question is presented even more clearly in this case than in the others. KPC Petition at 12 n.7.

Moreover, respondent cannot continue to succeed with its persistent contention that once an all-inclusive conspiracy is alleged (however vague its contours), none of its component parts need be analyzed in order to determine whether the antitrust laws were violated or whether antitrust injury resulted. To accept respondent's contention would read the requirements of anticompetitive conduct and antitrust injury out of the antitrust laws. Respondent's approach buttresses the need for some direction by this Court as to the recurring legal questions presented for review.

B. Respondent Cannot Rebut the Immediate Need for This Court to Review the Ninth Circuit's Subjective Standard For Determining "Predatory" Bidding in This Case.

Respondent addresses the predatory bidding question in 2 of its 60 pages in response to the petitions of KPC and ALP. RBLC's Opposition to KPC's Petition at 22-23. Respondent does not deny the existence of a plain conflict between the circuits on the standards to be applied to claims of predatory bidding or pricing. Respondent does not deny the important and recurring nature of the question, and Respondent does not even take issue with the need for a cost-based test, rather than one based solely on subjective evidence of intent to prevail over competitors. Instead, Respondent surprisingly turns its back on the very Ninth Circuit test applied in this case and argues that *no* test of predation need be applied in a private case involving allegations of conspiracy to bid predatorily.

Respondent finds no support for this novel argument. No private case, including this one, has suggested that the test of predation in a conspiracy context should be different than the test in a single-actor context.

To begin with, the Ninth Circuit's decision in this case never so much as hints that a different test or analysis should be applied in a private case involving conspiracy claims and expressly refers to unilateral monopolization cases analyzing predatory pricing. Respondent refers to the test in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1035 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 57 (1982) as "simply irrelevant to the case at bar" (Respondent's Opposition to KPC's Petition at 23), but the Ninth Circuit expressly looked to *Inglis* and other single-actor predatory bidding cases. App. A at A-8 n.5.

Respondent then states that "the single-actor predatory pricing cases cited by petitioners are not in point." RBLC's Opposition to KPC's Petition at 22. Respondent thereby implies that defendants cited only "single-actor" cases and that no cases involving conspiracy allegations have applied cost-based tests. Neither contention is correct. In fact, *every* court which has considered claims of conspiracy to engage in predatory pricing in a private antitrust case (including the Ninth Circuit in this case and cases cited in KPC's petition) has applied the same test as would apply in a "single-actor" case. *See, e.g., Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256, 1259 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982) (affirming judgment n.o.v. for defendants where plaintiff alleged conspiracy to engage in predatory pricing but failed to allege that defendants priced below marginal cost; court held that absent evidence of pricing below marginal cost, pricing was not predatory); *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 853-54 & nn. 16-17 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981) (court assumed violation of predatory pricing for purposes of

appeal in case alleging conspiracy to price predatorily, and so did not decide issue of cost-based versus subjective test, but discussion of cost-based versus subjective test assumed same test would apply in conspiracy as in single-actor case); *Americana Industries, Inc. v. Wometco de Puerto Rico, Inc.*, 556 F.2d 625, 628 (1st Cir. 1977) (failure to allege persistent pricing below short-run, out-of-pocket costs substantially weakened "any possible claim of predatory conduct on the part of Wometco P.R. alone or in conspiracy with Wometco Enterprises" (emphasis added)).

RBLC mistakenly relies on *American Tobacco Co. v. United States*, 328 U.S. 781 (1946), as its lone authority for its novel argument. But *American Tobacco* was a criminal case brought by the United States, and therefore did not require proof of "antitrust injury." In the present case, RBLC as a private plaintiff is required to demonstrate that it has suffered an injury of the type which the antitrust laws were intended to remedy. 15 U.S.C. § 15; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

Even if RBLC could show a violation without cost-based evidence, it could never demonstrate antitrust injury without such evidence. A bidder who failed to outbid KPC or ALP because that bidder was not as cost-efficient is not injured by any antitrust violation. RBLC, a logger claiming a derivative injury from such a bid, is also not injured by any antitrust violation. Any antitrust injury caused by an alleged predatory price or bid¹—or by a conspiracy to price or bid predatorily—ultimately turns on the level of

¹RBLC plays a shell game when it tells this Court that its case does not involve claims of predatory bidding, after all, and is instead a price-fixing case. This is contrary to its own claim of injury, which is *not* based on an alleged fixed price, and is all the more absurd in light of the uncontroverted finding that the 1972 price offer by KPC was better-than-competitive. See KPC Petition at 7-9, 19-25.

the price or bid. There is no private antitrust harm until the price or bid crosses the line between competitive and predatory, and that line must be determined by some reference to a defendant's costs.²

In sum, respondent's position that no analysis is required of the level of bid or price is legally and logically unsupportable. The Ninth Circuit is correct in applying the *same* test in conspiracy and single-actor cases; the problem is that the purely subjective test adopted by the Ninth Circuit is erroneous and anticompetitive. This returns us to the question presented in KPC's petition, which urges that the test for predatory pricing or bidding must include some reference to a defendant's costs. That question should be resolved by this Court for all the reasons set forth in KPC's petition, none of which has been rebutted by respondent.

²The distinction proposed by RBLC between single-actor and conspiracy claims of predatory bidding or pricing is particularly pernicious and anticompetitive when combined with the fact that RBLC presented no direct evidence of conspiracy to bid "predatorily", but rather urged that successful bids against "outsiders" were "parallel conduct" giving rise to an inference of conspiracy (despite the fact that each bid was consistent with the business interests of each defendant, faced with a recognized timber shortage). (See generally ALP's petition discussing the Ninth Circuit's erroneous standards for inferring conspiracy.) Now RBLC would close the circle by arguing that, because this is a "conspiracy" case, there is no need even to address the question whether any of those bids was so high as to be unprofitable for a defendant, i.e., whether any of those bids was predatory rather than competitive. The result is treble damages without proof either of conspiracy or of predatory conduct.

C. Respondent's Shotgun Approach to KPC's Petition for Certiorari Further Demonstrates the Need for This Court to Provide Guidance to Lower Courts in Private Antitrust Actions on the Remaining Questions Presented, Including: Causation; Statute of Limitations; Standards for Inferring Conspiracy; and Right to a Jury Trial

RBLC avoided resolution of all critical legal issues in the courts below by intoning the magic word "conspiracy" and using this Court's admonition in *Continental Ore v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) against improperly "compartmentalizing" evidence of conspiracy.

Indeed, the essence of Respondent's opposition to certiorari is that legal rules and analysis simply should not apply. But this Court's decision in *Union Carbide* cannot continue to support RBLC's erroneous propositions that (1) the aggregation of a plaintiff's claims can be greater than the sum of their parts, and (2) the parts of a broadly-stated antitrust claim cannot or should not be analyzed. Citing *Union Carbide's* admonition that plaintiffs be given the full benefit of their proof, another panel in the Ninth Circuit has properly concluded that "[t]here can be no synergistic result such as [plaintiff] claims from a number of acts none of which show causal antitrust injury to [plaintiff]." *California Computer Products v. IBM*, 613 F.2d 727, 746 (9th Cir. 1979). Accord, *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 928 (2d Cir. 1981). Particularly in a complex case, the number of legal and evidentiary issues often requires the court to consider each instance of alleged anticompetitive conduct separately for "purposes of analytical clarity." 613 F.2d at 745. Accord, *Northeastern Tel. Co. v. AT&T*, 651 F.2d 76, 95 n.28 (2d Cir. 1981), cert. denied, 455 U.S. 943 (1982).

Thus, despite Respondent's "intoning the magic words 'unitary conspiracy' and 'totality of the evidence,'" *Zenith*

Radio Corp. v. Matsushita Electric Industrial Co., 513 F. Supp. 1100, 1169 (E.D. Pa. 1981), it is appropriate and indeed logically necessary to engage in careful analysis and to apply the law which Respondent has avoided in the courts below. To do otherwise is to turn the antitrust laws upside down, creating rules which defeat the very purposes of those laws.

As shown above, Respondent has urged that no test whatsoever be applied to RBLC's predatory bidding claim because it was all part of some huge, albeit internally inconsistent and ill-defined conspiracy. Respondent's approach to the causation question raised in KPC's petition is the same. Respondent urges that there need be no legal or rational basis for the finding that a two-year contract is illegal or anticompetitive, for it also was part of a conspiracy.³ All relevant facts on the issue remain undisputed, including: RBLC never asked KPC or anyone else for annual renegotiations based on end-product values; RBLC in fact solicited multi-year offers; and RBLC received a better-than-competitive price offer from KPC in 1972. The only complaint RBLC had was that it wanted to protect

³Respondent cites no case supporting the conclusion that the multi-year contract at issue is anticompetitive. RBLC merely notes that duration may be significant in evaluating exclusive dealing contracts, but of course fails to add that it has never claimed and could not claim that the Muddy River #3 contract was an exclusive dealing or output contract. It plainly was not. This Court has long recognized the benefits of such a multi-year contract, which RBLC also recognized until hindsight showed that it made the wrong choice. See generally *Standard Oil Co. v. United States*, 337 U.S. 293, 308-07 (1949); *United States v. General Dynamics*, 415 U.S. 486, 499-502 (1973).

itself from a fall in the market for end products but instead the market rose dramatically and unexpectedly.⁴

The 1972 two-year price offer remains the only basis for the finding of injury to RBLC by the courts below. Respondent's brief cannot alter the embarrassing truth that the only thing wrong with that 1972 price was that the end-product market happened to go up rather than down. Such is not the stuff antitrust claims are made of.⁵ Indeed, the courts below were simply persuaded to let RBLC use the antitrust laws to bet on the market with perfect hindsight. Of even greater concern under the antitrust laws, the courts below have thereby imposed on businesses the impossible duty of pricing with perfect prescience.

Respondent similarly asks this Court to ignore the statute of limitations because, after all, this is a con-

⁴RBLC has the temerity to suggest to this Court, without citation, that KPC knew that significant increases were coming. RBLC's Opposition to ALP's Petition at 13. There is no indication anywhere in the record, nor did the courts below find, that KPC or ALP had any idea in 1972 that the short-lived boom would take place in 1973 and 1974 due to the Arab oil boycott. The evidence shows exactly the opposite: *no one* was aware of the coming increase when KPC made the later-contested offer in June 1972, and the jump in prices did not begin until 1973. E.R. 1133, 1630-31. The end-product prices in 1973 were more than double the prices KPC had projected in the fall of 1972. RT XVI:39-42. RBLC's suggestion that KPC knew in 1972 of the continuing increases is inexcusable in light of the unequivocal record on this point.

⁵The Court of Appeals has essentially eliminated causation as an element of a private action, has failed to attribute damages to allegedly actionable antitrust misconduct, and has ignored the rule that the value of an asset allegedly lost by virtue of an antitrust violation must be determined at the time of loss. These legal arguments are scarcely addressed by Respondent, let alone rebutted.

spiracy case. But for the reasons set forth in KPC's petition, this Court should take this opportunity to clarify that

Plaintiffs cannot avoid the bar of the statute of limitations merely by characterizing each claim as part of a broad ongoing conspiracy continuing into the limitations period. *See Zenith, supra*, 401 U.S. at 338.

Argus v. Eastman Kodak Co., 1982-83 CCH Trade Cas. ¶ 65,024 at 70,696 (S.D.N.Y. 1982). The disregard of the statute of limitations by the Ninth Circuit in this case can only breed unfair results, decrease the ability of parties to estimate the settlement value of cases, and result in a proliferation of private antitrust cases based on claims that should have long been barred.

D. Conclusion

From the wrongful denial of a jury trial⁶ through the decision of the Ninth Circuit, this antitrust action involving a complex industry crucial to Southeast Alaska has been marked by a complete failure of analysis and application of proper rules of law. Respondent's opposition to certiorari has taken liberty with both facts and the law, showing a cynical confidence in this Court's limited ability to hear cases on certiorari. We can only hope that RBLC's success in obfuscation and avoidance of the antitrust laws

⁶RBLC's argument that KPC consented to its waiver of a jury trial ignores the express requirement of Rules 35(d) and 39(a), Federal Rules of Civil Procedure, that such consent be unanimous and further ignores the record: KPC expressly conditioned its consent on effective, unanimous consent by all parties as required under the rules. CR 480.

will not result in the perpetration of Ninth Circuit rules which are patently anticompetitive.

Respectfully submitted,

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